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Supreme Court of the United States

October Term, 1965

No. 2[redacted]463

IN THE MATTER
OF
J. E. SCHECTER CORPORATION,
Petitioner,
AND
CARRIER CORPORATION, AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, SARCO COMPANY, INC. and SARCOTHERM CONTROLS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 29,458

In the Matter

of

J. E. SCHECTER CORPORATION,

Petitioner,

AND

CARRIER CORPORATION, AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, SARCO COMPANY, INC. and SARCOTHERM CONTROLS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, J. E. Schecter Corporation, debtor in possession, prays to this Court that a Writ of Certiorari issue to review the judgment and decree of the United States Court of Appeals for the Second Circuit, which decision reversed the order and judgment of the United States District Court for the Eastern District of New York and the order and decree of the Referee in Bankruptcy.

Jurisdiction

The judgment of the United States Court of Appeals, Second Circuit, sought to be reviewed, was entered on May 21, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1), and Section 24c of the Bankruptcy Act, 11 U. S. C. Section 47c.

The Opinions Below

The opinion and order of the Referee in Bankruptcy is reproduced in the Appendix of the Court of Appeals 31a through 39a. The opinion of the United States District Court for the Eastern District of New York, which upheld the decision of the Referee in Bankruptcy and the contentions of the petitioner herein, is set forth in 234 F. Supp. 474. The opinion of the Court of Appeals for the Second Circuit, which reversed the decision of the United States District Court and the decision of the Referee in Bankruptcy is reported in —— F. 2d ——.

Questions Presented for Review

The questions presented by this petition are as follows:

1. Did the Court of Appeals for the Second Circuit err in reversing the United States District Court and Referee in Bankruptcy by impressing a trust on funds in the hands of the petitioner in light of established New Jersey statutory and case law?

2. Is the decision of the United States Court of Appeals in conflict with recognized Federal jurisprudence as established by Section 1652 of Title 28 of the United States Code and the principle of *Erie* v. *Tompkins*?

3. Does the force of New Jersey criminal statute 2A:-102-11 relating to private improvements give rise to a civil remedy permitting the impression of a trust in light of established New Jersey statutory and case law?

Statutes Involved

Criminal Statutes of New Jersey

"Embezzlement, Conversion and Misappropriation."

"2A:102-10. Misappropriation of funds paid to contractor for building purposes.

All moneys received by a contractor from the owner or mortgagee of real estate or any leasehold or other interest therein, for the purpose of having a building erected, constructed, completed, altered, repaired or added to, are trust funds in the hands of the contractor to be applied to the amount of all claims due or to become due and owing from the contractor to all persons furnishing labor or materials to him for the erection, construction or completion of the building or any alteration, repair or addition thereto, and any other reasonable and necessary charge in connection therewith. Any contractor or any officer, director or agent of the contractor, who pays or consents to the appropriation of such funds for any other purpose prior to the payment of all claims and charges for the payment of which the funds constitute a trust fund, is guilty of a misdemeanor. As amended L. 1954, c. 123, p. 599, Section 1."

"2A:102-11. Misappropriation of funds paid to subcontractor for building purposes.

All moneys received by a subcontractor from the owner or mortgagee of real estate, or any leasehold or other

interest therein, or from a contractor, for the purpose of having a building erected, constructed, completed, altered, repaired or added to, are trust funds in the hands of the subcontractor to be applied to the amount of all claims due or to become due and owing from the subcontractor to all persons furnishing labor or materials to him for the erection, construction or completion of the building or any alteration, repair or addition thereto, and any other reasonable and necessary charge in connection therewith. Any subcontractor, or any officer, director or agent of the subcontractor, who pays or consents to the appropriation of such funds for any other purpose prior to the payment of all claims and charges for the payment of which the funds constitute a trust fund, is guilty of a misdemeanor. As amended L. 1954, c. 123, p. 599, Section 2".

"2A:102-12. Misappropriation of funds received by contractor for construction of public improvement.

All moneys paid by the state, or an agency, commission or department thereof, or by a county, municipality or school district, or by a public authority, to any person pursuant to the provisions of a contract for the making of any public improvement, shall constitute a trust fund in the hands of such person as contractor. Any such person who shall use any of the moneys so received for a purpose other than the payment of claims for labor or material and such other proper charges as are incurred in connection with the contract, is guilty of a misdemeanor." L. 1932, C. 269, Sub Section 1, 2, p. 605 suppl. to L. 1898, C. 235, p. 794.

"2A:102-12.1. Evidence; sufficiency to authorize conviction.

It shall be deemed to be sufficient evidence to authorize conviction under sections 2A:102-9, 2A:102-10, 2A:102-11

or 2A:102-12 of the New Jersey Statutes, if it shall be proved that any person:

(1) Received any moneys or funds, which under any of said sections are declared to be trust funds in his hands for the purpose in said section described, and

(2) Failed to apply such moneys or funds, to any of the purposes to which they are provided by said section to be paid or applied;

unless it appears from the evidence against him that he has not paid or consented to the payment or appropriation of any such moneys or funds in any manner contrary to that prescribed in said section: L. 1959, c. 98, p. 238, Section 1."

Civil Statutes of New Jersey, Chapter 44

"Liens—Bonds of and Money Paid to Contractors on Public Works"

"Article 13. Money Paid to Contractors on Public Improvements as Trust Fund.

2:A44-147.* Money paid to contractor trust fund for payment of claims.

All money paid by the state of New Jersey or by any agency, commission or department thereof, or by any county, municipality or school district in the state, to any person pursuant to the provisions of any contract for any public improvement made between any such person and the state or any agency, commission or department thereof, or any county, municipality or school district in the state, shall constitute a trust fund in the hands of such person as such contractor, until all claims for labor,

* Should be 2A:44-148.

materials and other charges incurred in connection with the performance of such contract shall have been fully paid."

Statement of Case

The petitioner is a debtor in possession following the filing of a petition for an arrangement pursuant to Section 322 of Chapter XI of the Bankruptcy Act on November 27, 1962.

The respondents are suppliers of air conditioning, heating and ventilating equipment, who supplied the petitioner with such equipment for the improvement of a private improvement known as the "Engineering Quadrangle" at Princeton University, Princeton, New Jersey. The petitioner contracted with William L. Crow Construction Co. for the construction of heating, ventilating and air conditioning work for the "Engineering Quadrangle" for the sum of $1,223,970.

On December 16, 1963 the respondents as alleged Trust beneficiaries moved before the Referee for an order directing payment by the petitioner to the respondents and other job claimants of funds derived by petitioner from the "Engineering Quadrangle" construction contract, and for legal fees to the attorneys for the respondents.

The petitioner opposed the application on the grounds that the law of New Jersey was applicable to the funds in question and that Section 2A:102-11 of the Statutes of the State of New Jersey provided criminal penalties for misapplication of trust funds resulting from an improvement to real property, rather than civil remedies, and that the claims of the respondents were barred by the Statute of Limitation.

The Referee in bankruptcy denied the motion of the respondents and stated in his conclusions of law that "1. The Lien Law of the State of New York only applies to a contract for the improvement of real property located in the State of New York" and "2. That Section 2A:102-11 of the New Jersey Statutes is a criminal statute which provides no civil remedy for a diversion of funds received by a contractor for an improvement of real property located in the State of New Jersey." The Referee cited in support of his decision the case of *Plevy* v. *Schaedel*, 44 N. J. Super. 450, which held that New Jersey Statute 2A:102-10 created a criminal offense, but stated "no civil remedy was created by force of the criminal statute."

In the United States District Court, the respondents sought to review the decision of the Referee with respect to the trust fund issue and in the alternative to review the refusal of the Referee to order the return of a portion of the funds which the petitioner, pursuant to a prior order of the Referee, had paid to other creditors who had claimed some part of the funds from the New Jersey construction. The District Court in its decision upheld the Referee with respect to the issue of a civil trust fund and denied legal fees, but with respect to the payment made to other creditors, stated that the funds paid to said creditors were distributed improperly inasmuch as notice was not given to the requisite number of creditors, which included the respondents, and accordingly directed the petitioner to institute proceedings before the Referee to recover such funds from said creditors.

The respondents appealed to the Court of Appeals for a review of the decision of the District Court and the petitioner cross appealed from so much of the order of the District Court as required it to institute a proceed-

ing before the Referee for the recovery of the funds. The Court of Appeals reversed the Referee and the District Court and impressed a fund on "general equity principles" and directed that attorneys' fees for the respondents be determined by the District Court and be paid from the trust funds. With respect to the cross appeal by the petitioner, the Court declared the question as moot by reason of the fact that a Trust was impressed. The Court of Appeals reiterated the position of the Referee and the District Court that the laws of the State of New Jersey were applicable to the within matter rather than the laws of the State of New York.

The petitioner agrees that New Jersey laws govern the instant matter rather than the laws of the State of New York. However, petitioner deems the opinion and judgment of the Court of Appeals in conflict with accepted federal jurisprudence as well as the established statutory and case law of the State of New Jersey.

Reasons for Granting the Writ

The brief in support of this petition points up the fact that the decision of the Court of Appeals conflicts with the decision of the Courts of the State of New Jersey and further conflicts with the applicable statutes enacted in the State of New Jersey with respect to funds derived by a contractor from the construction of private improvements. It is respectfully submitted that the Court of Appeals was required by the decision of *Erie* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and Title 28, Section 1652 of the United States Code to apply the established law of the State of New Jersey, when it found that the law of New Jersey governed the within matter. The cases relied upon by the Court of Appeals with respect

to New Jersey law were applicable only to *public* improvements in the State of New Jersey, and were not applicable to funds received by a contractor from *private* improvements. The cases cited by the petitioner and the applicable statutes with respect to New Jersey law established the law of New Jersey, and the Court of Appeals was bound to accept such law as controlling.

The instant matter is of utmost importance since it concerns the right of the Federal Court to determine a matter on "general equity principles" which find no basis in the applicable laws of the State of New Jersey. Having determined that the law of the State of New Jersey applied, the Federal Courts are required to enforce the statutory and case law of that State.

ARGUMENT

POINT I

Federal courts are bound by state substantive statutes and related decisions.

Erie v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, binds the Federal Courts to recognize and enforce the statutes and decisions of the sovereign states in regard to matters of substantive law. In addition to the foregoing, Title 28 of the United States Code, Section 1652, entitled "State Laws as Rules of Decision" provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States, or Acts of Congress, or otherwise, require or provide, shall be regarded as rules of decision in civil

actions in the courts of the United States in cases where they apply."

In *Brady* v. *State of Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, this Court stated that:

"State courts, state agencies and the state legislatures are final expositors of state law under our federal regime."

The decision of the Court of Appeals is in direct conflict with established New Jersey law. In failing to apply the statutes of the State of New Jersey and the cases construing such statutes, and by utilizing "general equity principles," the Court circumvented the doctrine of *Erie* v. *Tompkins, supra.*

In *Krause* v. *Greenbarg*, 137 Fed. 2d 569 (3 Cir. 1943; cert. den. 64, S. Ct. 207, 320 U. S. 791), the Court stated:

"Our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits."

In *Yoder, et al.* v. *Nu-Enamel Corporation*, 117 F. 2d 488 (8 Cir. 1941), the Court stated:

"In the application of a state statute, the federal courts are, of course, bound by the construction made by the courts of the state. Senn v. Tile Layers Union, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. And the obligation to accept local interpretation extends not merely to definitive decisions, but to considered dicta as well. Hawks v. Hamill, 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610; Badger v. Hoidale, 8 Cir., 88 F. 2d 208, 109 A. L. R. 798. Indeed, under the implications of Erie Railroad

Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and West v. American Telephone and Telegraph Co., 61 S. Ct. 179, 85 L. Ed. —., where direct expression by an authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."

See also:

Shealy v. *Challenger Mfg. Co.*, 304 F. 2d 102 (4 Cir. 1962).

The Court of Appeals has departed from required standards of Federal jurisprudence in applying "general equity principles" to a factual situation governed by state statutes and the decisions construing those statutes.

It is necessary and important that this court review decisions which are at variance with Title 28, Section 1652 of the United States Code.

POINT II

The statutory laws of the State of New Jersey provide no civil remedy for the impressing of a trust on funds obtained by a contractor arising from the construction of a private improvement.

Petitioner contends that solely by force of statutory enactment can a trust be impressed in the instant matter. New Jersey enacted specific legislation concerning funds derived by a subcontractor involving construction of public and private improvements. Section 2A:102-10 and Section 2A:102-11 of the New Jersey Statutes enunciate criminal statutes with respect to contractors and subcontractors and contain the same language.

Petitioner was a subcontractor performing certain services on a private improvement known as the "Engineering Quadrangle" at Princeton University, in Princeton, New Jersey. It is conceded by both petitioners and respondents that such construction related to a private improvement.

The aforesaid statutes, together with Sections 2A:102-12 and 2A:102-12.1 are clearly criminal in scope and purpose and are found in the sections of the New Jersey Statutes relating to embezzlement, conversion and criminal justice. The respondents contend that Sections 2A:102-10 and 2A:102-11 create civil remedies for the impression of a trust on funds in the possession of the petitioner. The petitioner contends that the aforesaid statutes are wholly criminal in nature and scope and that there is no civil remedy by force of the criminal statutes.

It is without dispute that Sections 2A:102-10 and 2A:102-11 relate to funds in the hands of a contractor or

subcontractor resulting from the construction and improvement of property of a private nature and that Section 2A:102-12 is a criminal statute relating to funds derived by a contractor for the improvement of property of a public nature. Section 2A:102-12.1 sets forth the criteria to authorize criminal convictions with respect to Sections 2A:102-10-11 and 12.

With respect to the Criminal statute dealing with public improvements, as cited in New Jersey Statutes Annotated, at page 173, the following appears "Cross Reference": "Money paid to contractor as trust fund. See Section 2A:44-148."

With respect to the private improvement criminal statute, at page 173 of the same volume, appears the following "Cross References" with respect to Section 2A:102-11: "Punishment for misdemeanor. See Section 2A:85-7."

On page 569 of the New Jersey Statutes Annotated, wherein Section 2A:44-148 appears, the following "Cross Reference" is indicated: "Misappropriation as misdemeanor, see Section 2A:102-12."

The Legislative history of Sections 2A:102-12 and 2A:102-10-11 indicate that said laws were enacted by the same Legislature of the Senate and General Assembly of the State of New Jersey in 1932. In April of 1932, the forerunner statutes of 2A:102-10 and 2A:102-11 were enacted. On June 15, 1932, the Legislature enacted the forerunner of Section 2A:102-12 and the forerunner of Section 2A:44-148. It is of significance that the same New Jersey legislature enacted both the public and private improvement statutes and that said legislature also enacted a civil counterpart limited to the public improvement statute.

The petitioner contends that the Court of Appeals erred in impressing a trust on the funds in the hands of the petitioner derived from a private improvement construction project, whereas the respondents contend that both on equitable principles and by a reading of Section 2A:102-10 and 11, the Legislature created both a criminal and civil trust fund remedy with respect to private improvements, thus permitting the impression of a civil trust on funds in the hands of the petitioner. As further evidence of the fact that no civil counterpart was enacted in New Jersey for private improvements, petitioner refers the Court to the various captions under which the aforesaid sections have been placed in the New Jersey statutes. It becomes apparent that Sections 2A:102-10, 11, 12 and 12.1, which appear under Ch. 102 of the New Jersey Statutes have been grouped with the criminal statutes under the heading of *"Embezzlement, Conversion and Misappropriation"*, whereas, Sections 2A:44-148 appear under Ch. 44 of the New Jersey Statutes entitled, *"Liens—Bonds of and Money paid to Contractors on Public Works"*. Article 13 which appears as a subdivision under Ch. 44 is entitled *"Money paid to Contractors on Public Improvement as Trust Fund"*. Therefore, in the enactment of public and private improvement trust fund statutes, the Legislature well knew the purport of its acts since it saw fit to enact a civil counterpart to the provisions relating to public improvements and placing said law with other statutory civil lien laws but did not enact a civil counterpart to the criminal private improvement statutes.

The Courts of the State of New Jersey have made clear the intention of the Legislature with respect to each of the above statutes and by no force of judicial construction in light of the background of the enactment of the

aforesaid statutes could the Court of Appeals have construed a remedy permitting the impression of a trust on the funds in the hands of the petitioner with respect to private improvements.

POINT III

Case law of New Jersey is dispositive of the issue and reenforces the petitioner's contention herein.

Each of the statutes referred to in Point II of this petition, with the exception of 2A: 44-148, imposes a criminal penalty upon a subcontractor or contractor who diverts funds with respect to either public or private improvement construction, but only Section 2A:102-12 imposes a civil remedy for the recovery of the funds by virtue of 2A:44-148.

The cases of *Plevy* v. *Schaedel,* 44 N. J. Super. 450, 452, 130 A. 2d, 910 and *Samuel D. Wasserman* v. *Klahre,* 24 N. J. Super. 143, 93 A. 2d 628, are dispositive of the issue as to whether or not the private improvement criminal statutes create a remedy for the recovery of such funds.

In the *Plevy* case, the plaintiff, a subcontractor, brought an action against Schaedel for damages arising from a breach of contract. Schaedel was a New Jersey contractor, under contract to furnish certain repair work on a private improvement in the State of New Jersey. The owner of the property paid Schaedel pursuant to the general contract. Thereafter Schaedel was adjudicated a bankrupt and the plaintiffs were not fully paid for the work done as a subcontractor. Plaintiffs contended that they had a right of action to impress a trust under New Jersey Statute 2A:102-10.

The facts stated in such case are similar, if not exactly in point to the facts of the within matter. The Court stated:

> "Waugh, J.S.C. The sole question to be decided in this case is whether or not N.J.S. 2A:102-10 creates a civil remedy available to the plaintiffs."

The Court then went on to state:

> "Plaintiffs here urge that the use of the term 'trust fund' in this criminal statute creates a right inuring to his benefit whereby he can now proceed against the defendants in a civil action to recover the monies allegedly held in trust and wrongfully paid out prior to the satisfaction of his claim as sub-contractor against the defendant contractor.
>
> (1) I do not agree with plaintiffs' contention, and accordingly find that no civil remedy was created by force of the criminal statute. In reaching this conclusion, I find support in the case of Wasserman, Inc. v. Klahre, 24 N. J. Super, 143, 147 (App. Div. 1952), wherein the following language was used by our Appellate Division:
>
> 'Under our former Constitution, as under our present one, the title of a statute operates as a limitation on the enacting clauses, so that a construction which would give the statute a direct effect beyond the object expressed in the title must be rejected * * *. It is entirely clear to us that the scope of the statutory provision on which the plaintiffs build their case, is limited to the creation of a criminal offense; and that no civil action can be based directly on the statute.'
>
> This statute was enacted by the Legislature as L. 1932, c. 104 and was entitled 'A supplement to

an act, entitled 'An act for the punishment of crimes' (Revision of 1898).'

The argument by plaintiff that a civil remedy, is created by N.J.S. 2A:102-10 is clearly refuted by the title of the original legislature enactment under the rule of the Wasserman case, supra. See also Raymond Concrete Pile Co. v. Federation B. & T. Co., 288 N. Y. 452, 45 N. E. 2d 496 (Ct. App. 1942), affirmed on reargument 290 N. Y. 611, 48 N. E. 2d 709 (Ct. App. 1943).

Additional support for the conclusion I reach is found by contrasting the legislative treatment of contracts for public improvements with contracts concerning private individuals.

N.J.S. 2A:102-12 provides that it is a dismemeanor for a contractor to misappropriate funds received by him for construction of a public improvement. These funds are specifically designated as trust funds and N.J.S. 2A:44-148 creates as a civil matter a trust fund in the hands of the contractor until all claims for labor, materials and other charges incurred in connection with the performance of a public contract shall have been fully paid. N.J.S. 2A:44-148 provides as follows:

'2A:44-147. Money paid to contractor trust fund for payment of claims'

All money paid by the state of New Jersey or by any agency, commission or department thereof, or by any county, municipality or school district in the state, to any person pursuant to the provisions of any contract for any public improvement made between any such person and the state or any agency, commission or department thereof, of any county, municipality or school district in the state, shall constitute a trust fund in the hands of such

person as such contractor, until all claims for labor, materials and other charges incurred in connection with the performance of such contract shall have been fully paid.

Clearly, in the instance of public improvements, the Legislature has created a civil remedy, which has its criminal counterpart in N.J.S. 2A:102-12. However, the Legislature has not enacted a statute creating the same civil remedy to accompany, as it were, the crime which it created in N.J.S. 2A:102-10.

I find that the failure of the Legislature to specifically create the civil remedy in the case of private contracts as it did where public contracts are involved (N.J.S. 2A:44-148) cannot be cured by judicial interpretation of the term 'trust funds' as found in the statute defining the criminal act. Since criminal statutes must be strictly construed, and further, since it is a long standing precept that civil remedies are not created in criminal laws, I find hat plaintiff has not established that the moneys held by the defendant here were trust funds held for the benefit of the plaintiff and others in his class. I, therefore, deny plaintiffs' motion for summary judgment and grant defendants' cross motion for dismissal of the complaint for failure to state a cause of action."

The Court, referred to the New York case of *Raymond Concrete Pile Co.* v. *Federation Bank and Trust Company,* 288 N. Y. 452, 43 N. E. 2d 486, affirmed on reargument 290 N. Y. 611, 48 N. E. 2d 709, construing Section 25-a of the Lien Law of the State of New York as being penal in nature, to be strictly construed and not subject to judicial amendment so as to enlarge its clearly defined scope

and purpose to impose civil liability. Section 25-a contained the following clause:

> "The funds received by a contractor for a public improvement are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors * * *."

However, the statute was construed to be wholly penal in nature and could afford no civil relief. Notwithstanding that the sections of the Lien Law required a liberal construction, the Court reiterated that the Lien Law did not authorize judicial amendment so as to enlarge the clearly defined scope and purpose of Section 25-a, which was penal.

The Court in the *Plevy* case, in reaching its decision with respect to there being no civil remedy by force of a criminal statute, referred to the *Wasserman* v. *Klahre* case, *supra,* wherein the plaintiff a materialman supplied to Candrilli certain materials and labor for the construction of a private improvement in New Jersey. Wasserman was not paid in full and the defendant, Klahre, who was a judgment creditor of Candrilli and unrelated to the construction of the private improvement in question had levied upon Candrilli's bank account, which had funds therein derived from the construction of the private improvement. Klahre obtained the money toward the satisfaction of his judgment against Candrilli and the plaintiff, Wasserman, instituted an action against Klahre pursuant to New Jersey Revised Statutes 2:124-16 which was the forerunner to 2A:102-10 on the basis that Klahre was in the possession of trust funds that rightfully belonged to Wasserman. The question presented to the Court was whether or not the money in the hands of

Klahre constituted a trust fund and the Court, in reaching its decision in favor of the judgment creditor against the impressing of a trust, stated as follows:

> "(1) 'In the absence of statute, one who furnishes material or labor for a building or any structure which is part of the land has no lien, legal or equitable, on the land, the structure, or the contract price.' Guise v. John C. Guise, Inc., 116 N. J. Eq. 590 (E. & A. 1934). And see Grover v. Board of Education, 102 N. J. Eq. 415 (Ch. 1928), affirmed 104 N. J. Eq. 197 (E. & A. 1929).
>
> (8) The plaintiffs had a complete remedy under the Mechanic's Lien Law, R.S. 2:60-105, et seq., which they voluntarily surrendered when they executed and delivered discharges of their notices of intention and releases of their lien claims. * * * "

The respondents had enforceable civil remedies available to them by New Jersey statute. Pursuant to Article 10 of Chapter 44 of Title 2A of the New Jersey statutes, more particularly Sections 2A:44-64 through 2A:-44-124, the respondents could have filed a mechanic's lien against the property or a stop notice against the owner of the property pursuant to the "Mechanic's, Materialmen and Laborers in General" statutes.

2A:44-66 of the New Jersey statutes provides as follows:

> "Except as otherwise provided in this article, the property herein enumerated shall be liable for the payment of any debt contracted or owing to any person for any of the purposes herein specified, which debt shall be a lien upon such property; that is to say

> a. Every building together with the land whereon it stands, including the lot or curtilage whereon the same is erected, for labor performed or materials furnished for the erection, construction or completion of such building, or any alteration or repair thereof or addition thereto; * * *."

In *Friedman* v. *Stein*, 4 N. J. 34, 71 A. 2d 346, 1950, the Court stated:

> Mechanic's and materialmen's liens have no recognition in equity except as prescribed by statute, and being in derogation of common law, provisions of statute giving rise to such liens are to be strictly construed, while provisions for their enforcement are to be liberally construed.
>
> Mechanic's and materialmen's liens are distinct from underlying debts and liens afford a cumulative remedy for enforcement of debt, and claimant's status is that of a general creditor until those things are done which give him security of statutory lien and until then, lien is inchoate.

In addition to the filing of a mechanic's lien against the property, the law provides in Section 2A:44-77 for the issuance of "stop notices" where a contractor or subcontractor refuses to pay any person who has furnished him materials for use in or about the erection, construction, completion or repair of any building. The effect of such stop notices creates a fund from the owner of the property to the unpaid materialmen. After a stop notice is received by the owner and filed by the unpaid materialmen, the owner of the building is authorized to retain the amount which may be due the defaulting contractor and

may pay such sum to the unpaid materialmen in the same order as the stop notices are received.

In *Brown* v. *Home Development Co.*, 129 N. J. Eq. 172, 18 A. 2d 742, 1941, the Court indicated that a stop notice served on an owner of property by laborers and materialmen operated as an assignment *pro tanto* of the contract price owing by the owner to the contractor. The owner was obliged to retain, for the benefit of those unpaid materialmen giving notice, all funds which might thereafter become payable to the defaulting contractor under the contract. See also *Tile Wholesalers & Importers* v. *Ruppert*, 125 N. J. L. 597, 17 A. 2d 607, 1941.

The respondents had an adequate statutory remedy to enforce the collection of any unpaid sums due them from the petitioner. However, respondents apparently failed to take advantage of such statutory remedies and now seek to create a civil remedy which is unknown in the State of New Jersey.

POINT IV

The cases relied upon by the Court of Appeals are not dispositive of the issue.

In the lower Court the respondents urged that the decisions in:

Albert Pick Co. v. *Travis*, 6 F. Supp. 486 (E. D. N. Y. 1933);

In re Heintzelman Const. Co., 34 Supp. 109 (W. D. N. Y. 1940);

Wickes Boiler Co. Inc. v. *Godfrey-Keeler, Inc.*, 116 F. 2d 842 (C. C. A. 2d, 1940), mod. 121 F. 2d 415, cert. den. 314 U. S. 686.

were controlling with respect to the within matter. It is respectfully submitted that the aforesaid cited cases have three characteristics in common which distinguish them from the instant matter:

(1) New York State law was applied by the Courts;

(2) Section 36-a of the Lien Law of the State of New York was the subject of each of the cases which involved private improvements;

(3) Section 36-a of the New York Lien Law constitutes a criminal and civil statute.

In each of the above cited cases the plaintiff was engaged as a subcontractor or contractor dealing in the State of New York pursuant to Section 36-a of the Lien Law of the State of New York. The statute in question was construed to be both criminal and civil in nature and the Court impressed a trust in favor of the subcontractor. These cases cannot be construed with the provisions of the New Jersey statutes which have been segregated into private and public improvement statutes of which only the public improvement statute has been held to create civil remedies by reason of a separate statutory enactment.

The cases cited by the respondent with respect to New Jersey law, to wit:

National Surety Corp. v. *Barth,* 11 N. J. 506 (1953);

Morris Picker v. *City of Bayonne, et al.,* 60 N. J. Super. 251;

Wilson v. *Robert A. Stretch, Inc.,* 44 N. J. Super. 52, 58;

Stulz-Sickles Co. v. *Friedburn Const. Corp.,* 114 N. J. Eq. 475;

are not dispositive of the issue since each of said cases involved public or municipal improvements under Section 2A:44-148 of the New Jersey Statutes. In said cases the funds created with respect to the public project were created by specific State and local public laws earmarked for specified purposes. In *National Surety Corp.* v. *Barth, supra,* the statutes involved related to funds for public housing. The Court stated:

> "Clearly funds have been appropriated and dedicated for a specific purpose by the United States Congress, The New Jersey Legislature and the voters of the State of New Jersey. A special fund labeled 'State Housing Fund' has been established and all monies deposited therein are earmarked for the purposes of emergency housing."
>
> "The Legislature clearly intended to set aside all monies received from these three sources and to earmark them for the purposes of public housing. The money was not available for any use except in furtherance of the policies of the act."

In *Morris Picker, supra,* the City of Bayonne, New Jersey constructed a municipal swimming pool by sale of bonds pursuant to the local bond law. The Court again referred to Section 2A:44-148 of the New Jersey Statutes and stated that a civil remedy was created with respect to the public improvement funds.

In *Stulz-Sickles Co., supra,* the subject matter of the suit related to funds due a contractor involved in municipal construction. Section 2A:44-148 was again involved and the Court permitted a civil remedy by reason thereof.

To enunciate a civil remedy with respect to Sections 2A:102-10 and 2A:102-11 would not be judicial interpre-

tation, it would be judicial legislation which should be exclusively limited to enactments by the New Jersey State Legislature.

POINT IV

A bankruptcy court is without power to grant compensation not expressly provided for by the Bankruptcy Act.

Although the Court of Appeals directed attorneys' fees be paid to the respondent's counsel as determined by the District Court, and that such fees be paid from the trust funds in question, the petitioner deems such a direction to be contrary to established bankruptcy practice.

A bankruptcy court has only such jurisdiction as is conferred upon it by the statute. *New Lamp Chimney Co.* v. *Ansonia B.C. Co.*, 91 U. S. 656, 23 L. Ed. 336. *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 20 S. Ct. 1000, 44 L. Ed. 1175. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. *Matter of Hollins*, 2 Cir., 229 Fed. 349, cert. den. 241 U. S. 661, 36 S. Ct. 448, 60 L. Ed. 1226. *Silberberg* v. *Ray Chain Stores, Inc.*, 3 Cir. 58 F. 2d 766, cert. den. *Winne* v. *Silberberg*, 287 U. S. 631, 53 S. Ct. 83, 77 L. Ed. 547. *Wheeling Structural Steel Co.* v. *Moss*, 4 Cir., 62 F. 2d 37; *Naylor* v. *Cantley*, 8 Cir., 96 F. 2d 761; *Moore* v. *Scott*, 9 Cir., 55 F. 2d 863. Although jurisdiction in bankruptcy is conferred on the district court, the latter when sitting as a Court of Bankruptcy is regarded as a separate court exercising powers and a jurisdiction distinct from its powers as a district court. *Hanna* v. *Brictson Mfg. Co.*, 8 Cir., 62 F. 2d 139. *Norris'* Case (D.C. Mich.) 18 Fed. Cas. 317, Fed. Cas. No. 10304.

It is unquestioned that bankruptcy courts have equity powers, but it is settled that the equitable powers may be exercised only within the limits of the Bankruptcy Act and subject to and consistent with the specific provisions contained therein. *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293, *Young* v. *Higbee Co.*, 324 U. S. 204, 65 S. Ct. 594, 89 L. Ed. 890. *Matter of Columbia Ribbon Co.*, 3 Cir. 117 F. 2d 999, *Wheeling Valley Coal Corp.* v. *Mead*, 4 Cir. 171 F. 2d 916; *Burton Coal Co.* v. *Franklin Coal Co.*, 8 Cir., 67 F. 2d 796. In *Matter of Judith Gap Commercial Co.*, 9 Cir., 5 F. 2d 307, 309, the Court held that though bankruptcy proceedings are equitable in their nature "nevertheless they are to be administered in accord with the Bankruptcy Act and general orders, and not by virtue of any broad unlimited equity power".

Compensation for services rendered is but one of many phases of bankruptcy proceedings expressly governed by the Bankruptcy Act. The Courts of Appeal have uniformly held that the bankruptcy court lacks power to grant, and the policy of the Act is against compensation not expressly provided for by the Act. *Lane* v. *Haytian Corp.*, 2 Cir., 117 F. 2d 216, cert. den. 313 U. S. 580, 76 S. Ct. 1101, 85 L. Ed. 1537; *Guerin* v. *Weil, Gotschal & Manges*, 2 Cir. 205 F. 2d 302, *Berry* v. *Root*, 5 Cir., 148 F. 2d 945, cert. den. 326 U. S. 755, 66 S. Ct. 91, 90 L. Ed. 453. *In re First Bond & Mortgage Co.*, 5 Cir., 74 F. 2d 930, *Matter of Joslyn*, 7 Cir., 224 F. 2d 223, *Levin* v. *Barker*, 8 Cir., 122 F. 2d 969. In *Berry* v. *Root* (*supra*), 148 F. 2d 945, 946, the Court after noting that a bankruptcy court often applies equitable principles but "is not strictly a Court of Equity, but a statutory Court

created by the Bankruptcy Act, and governed by it", stated:

> "As to that proceeding the Act of 1898 has not adopted the equity precedents and practices as to costs, including costs as between attorney and client, commonly called an allowance of attorney's fees. The original Act and all the amendments and expansions have dealt specifically with the costs and attorney's and other fees to be allowed, and have dealt jealously with them. The fees allowable for services in each kind of bankruptcy proceedings have been provided, expressly or by implication, others are excluded."

CONCLUSION

It is respectfully submitted that the petitioner has shown that important questions exist for the granting of the petition for writ of certiorari and the writ should issue.

Respectfully submitted,

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APPENDIX

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of May one thousand nine hundred and sixty-five.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
Present: HON. THOMAS W. SWAN,
Present: HON. IRVING R. KAUFMAN,
Circuit Judges.

In the Matter
of

J. E. SCHECTER CORPORATION,
Debtor-Appellant,

CARRIER CORPORATION, AMERICAN RADIATOR and STANDARD SANITARY CORPORATION, SARCO COMPANY, INC., and SARCOTHERM CONTROLS, INC.,
Petitioners-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to the petitioners-appellants.

It is further ordered, adjudged and decreed that the appeal of the debtor be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals

SWAN, *Circuit Judge*:

The legal issue presented by this appeal is whether certain funds held in a special account in a New York bank by J. E. Schecter Corporation, hereafter referred to as Schecter or the debtor, are trust funds. These funds were acquied as a result of the improvement of real property owned by Princeton University, located in Princeton, New Jersey, and called the "Engineering Quadrangle." The facts are stated in detail in the opinion of Judge Rayfiel and need not be here repeated except so far as necessary to supply a frame for subsequent discussion of the legal questions involved.

William L. Crow Construction Company, a New York Corporation, hereafter called Crow, was the general contractor for the Engineering Quadrangle. In January 1961 Crow entered into a subcontract with Schecter to provide all labor and materials for the satisfactory completion of the plumbing, heating, ventilating, and air conditioning work. Thereafter on November 27, 1962 Schecter filed a petition under Chapter XI of the Bankruptcy Act and an order was entered authorizing it to continue in possession of its assets, to continue its business under the supervision of the court, staying all creditors from proceeding with their claims, and referring the case to Referee in Bankruptcy William J. Rudin. In December 1963 the four appellants, on behalf of themselves and other contractors and materialmen similarly situated who had worked for or supplied goods to Schecter in connection with the Princeton project, petitioned the Referee to impress a trust on funds in possession of the debtor acquired as a result of the improvement of Princeton's Engineering Quadrangle. The Referee denied the petition. On No-

vember 17, 1964, the Referee's order was affirmed by Judge Rayfiel, with a remand of the matter to the Referee for the purpose of directing the debtor to take appropriate action to recover funds previously paid to certain claimants. This is the order before us on appeal.

For reasons hereafter stated we hold that the court erred in failing to impress a trust on the funds in question, and we dismiss the debtor's cross-appeal.

1. The cross-appeal of the debtor

The debtor has appealed the order of November 17, 1964 which remands the matter to the Referee in Bankruptcy for the purpose of directing the debtor to proceed with an appropriate motion to recover funds paid to six creditors. This part of the order was premised on the court's finding that no trust exists. Although we see no basis for an appeal by Schecter from the remand order, since it does not adversely affect the debtor but only the six creditors, see *Universal Oil Products Co.* v. *Cosden Petroleum Corp.*, 5 Cir., 178 F. 2d 495, we need not rest on that ground for the cross-appeal is mooted in any event by our holding that a trust should have been impressed. Accordingly, the cross-appeal is dismissed.

2. Applicability of the New York Lien Law

The subcontract between Crow and Schecter provided that "All matters relating to the validity, performance, interpretation or construction of the agreement or the breach thereof shall be governed by the Law of the State of New York." In reliance on this provision appellants contend that the New York Trust Fund Lien Law should be applied. See *Aquilino* v. *U. S. A.*, 10 N. Y. 2d 271, 275-

276. But even if we follow the directive of the choice-of-law provision, the claimants run into the barrier of the authoritative determination, by the highest state court, that the New York Lien Law does not apply to improvements to real property located outside the State of New York. *Allied Thermal Corp.* v. *James Talcott, Inc.*, 3 N. Y. 302, 165 N. Y. S. 2d 91 (1957). We hesitate to permit the contractual provision to overrule the considerations which compelled that decision, especially since—as we shall now explain—the claimants will be entitled to relief via the application of New Jersey law.

3. The New Jersey statutes

Section 2A:102-11 is printed in the margin.[1] It consists of two sentences. The first sets forth that moneys received by a subcontractor from the owner of real estate or from a contractor for the purpose of having a building erected are trust funds. The second declares that any subcontractor who pays or consents to the payment of

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1. "Misappropriation of Funds Paid to Subcontractor for Building Purposes.

All monies received by a subcontractor from the owner or mortgagee of real estate, or any leasehold or other interest therein, or from a contractor, for the purpose of having a building erected, constructed, completed, altered, repaired or added to, are trust funds in the hands of the subcontractor to be applied to the amount of all claims due or to become due and owing from the subcontractor to all persons furnishing labor or materials to him for the erection, construction or completion of the building, or any alteration, repair or addition thereto, and any other reasonable and necessary charge in connection therewith. Any subcontractor or any officer, director or agent of the subcontractor, who pays or consents to the appropriation of such funds for any other purpose prior to the payment of all claims and charges for the payment of which the funds constitute a trust fund, is guilty of a misdemeanor. As amended L. 1954, c. 123, p. 599, §2."

such funds for any other purpose is guilty of a misdemeanor. *A priori* one would suppose that the first sentence is intended to give the beneficiaries of such "trust funds" a civil remedy. But no case has so held and under the New Jersey Constitution the title of a statute limits the scope of the enacting clauses; hence a construction which would give the statute a direct effect beyond the object expressed in the title must be rejected. Se *Jordan* v. *Moor*, 82 N. J. L. 552; *St. John, etc. Church* v. *Gengor*, 121 N. J. Eq. 349. The statute we are considering was originally entitled "A Supplement to an act entitled 'An act for the punishment of crime.'" See *Samuel D. Wasserman, Inc.* v. *Klahre*, 24 N. J. Super 143, 93 A. 2d 638. *Plevy* v. *Schaedel*, 44 N. J. Super 450, 130 A. 2d 910, but the title now reads "Misappropriation of Funds Paid to Subcontractor for Building Purposes." Whether this change of title is sufficient to permit the granting of a civil remedy we need not determine in view of the grounds upon which we predicate the existence of a trust.

4. Equitable principles are applicable.

It is elementary that a court of bankruptcy is also a court of equity. Under the undisputed facts we believe that the funds in question should be impressed with a trust on principles of equity and justice. Here the statute creates the trust, detailing its terms, and general equity principles may be employed to enforce it. See *Hiller & Skogland, Inc.* v. *Atlantic Creosoting Co.*, 40 N. J. 6,—n. 3, 190 A. 2d 380, 388 n. 3 (1963), citing with approval *Samuel D. Wasserman, Inc.* v. *Klahre, supra,* where the Superior Court, Appellate Division, although refusing to impose a constructive trust on funds in the hands of a third party not mentioned in the statute who lacked notice

of the trust fund character of the moneys, noted nevertheless that if there had been a statutory violation, the claimant "would have had whatever civil remedy might be appropriate to the circumstances under the general principles of law and equity." 24 N. J. Super at ——, 93 A. 2d at 631. Moreover, several New Jersey cases have held that where a fund is created for a special purpose, even though it does not meet the exact terms of the statutory trust, a trust will be imposed upon general equity principles. See *National Surety Corp.* v. *Barth*, 11 N. J. 506 (1953); *Morris Picker* v. *City of Bayonne, et al.*, 60 N. J. Super 251; *Wilson* v. *Robert A. Stretch, Inc.*, 44 N. J. Super 52, 58; *Stulz-Sickles Co.* v. *Fiedburn Constr. Corp.*, 114 N. J. Eq. 475. See also *Filardo* v. *Foley Bros.*, 297 N. Y. 217, cert. den. 336 U. S. 281; *Wickes Boiler Co.* v. *Godfrey-Keeler, Inc.*, 2 Cir., 116 F. 2d 842, modified 121 F. 2d 415, cert. den. 314 U. S. 686. Since Schecter was merely a conduit between the general contractor and the claimants, we see no reason for not applying those principles to this case. Indeed, if Schecter is permitted to remove the funds to New York and allocate them in this manner, it can misappropriate sums derived from a real estate improvement in New Jersey with complete immunity, thereby thwarting the New Jersey criminal statutes and also avoiding any quasi-fiduciary obligations.

For the foregoing reasons we hold that the court erred in failing to impress a trust on the funds in question, and we direct that attorney's fees as determined by the District Court, be paid from the trust funds.